No. 85-1

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1984

THE STATE OF OHIO,
Petitioner,

v.

WILLIE EUGENE ADKINS,
Respondent.

THE STATE OF OHIO,
Petitioner,

v.

DANNY ALLEN COUNTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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54 pp

QUESTIONS PRESENTED

1. Whether the solicited, extra judicial, post-arrest statement of a co-defendant made to a law enforcement officer in a face-off confrontation with the defendant with his consent after the giving of the warning advice mandated by *Miranda v. Arizona* 384 U.S. 436 wherein the defendant adopts the statement of the co-defendant that an armed robbery was planned and took place, that after the robbery a kidnapping and murder of the store clerk occurred and that he was present at all times but he denied carrying the gun or killing the victim can be repeated at defendant's trial where the co-defendant does not testify without violating defendant's right to confrontation?

2. Whether it is harmless error under the *Chapman v. California* 386 U.S. 18, and *Harrington v. California,* 395 U.S. 250, standards to admit a co-defendant's statement made in the presence of the defendant and denied in part by the defendant when the part of the statement adopted and not denied by the defendant along with other evidence presented establishes defendant's guilt overwhelmingly upon an aiding and abetting theory, to wit: the defendants planned an armed robbery, obtained a shotgun, went to a carryout, one robbed the clerk at gunpoint and kidnapped him and drove him to a wooded area and murdered him, each defendant saying he was present at all times but did not carry the gun or do the actual shooting?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, The State of Ohio, prays that a writ of certiorari issue to review the decision of the Supreme Court of the state of Ohio in the above-entitled cases.

OPINIONS BELOW

In the case of Adkins as well as in the case of Counts, the Supreme Court of Ohio denied the motions of the State of Ohio to certify the record and for leave to appeal without opinion.

The decision of the Court of Appeals for Pickaway County, Fourth Appellate District, in Case No. 81CA24 (Counts) is unreported as is the decision of the Court of Appeals for Highland County, Fourth Appellate District in Case No. 468 (Adkins).

JURISDICTION

The decision of the Supreme Court of Ohio was entered on April 3, 1985, in the case of Willie Adkins. Its decision was entered on April 15, 1985, in the case of Danny Counts.

Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT VI:

> In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Ohio Revised Code (Page's) Section 2923.03, Complicity:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
> (1) Solicit or procure another to commit the offense;
> (2) Aid or abet another in committing the offense;
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
>
> . . .
>
> (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

STATEMENT OF THE CASE

ADKINS

Adkins was indicted on June 19, 1981, for the offenses of Aggravated Robbery in violation of Ohio Revised Code 2911.01, Kidnapping in violation of Ohio Revised Code 2905.01 and Aggravated Murder in violation of Ohio Revised Code 2903.01. After a change of venue from the Court of Common Pleas of Pickaway County to the Court of Common Pleas of Highland County, Ohio, a jury trial was had on September 21-24, 1981. Adkins was found guilty on all three counts as set forth in the indictment. The court found the offense of Kidnapping merged into the offense of Aggravated Rob-

bery and sentenced the defendant on the offense of Aggravated Murder to life imprisonment and on the offense of Aggravated Robbery to a minimum term of seven years and a maximum term of twenty-five years in the Ohio Penitentiary, said sentences to run consecutively.

On October 21, 1981, Adkins filed a timely notice of appeal to the Court of Appeals for Highland County, Fourth Appellate District, setting forth five assignments of error, one of which included:

> ASSIGNMENT OF ERROR NO. 3:
> The trial court erred by admitting testimony in evidence of a co-defendant's extra-judicial statements at trial.

The Court of Appeals for Highland County, Fourth Appellate District, on December 5, 1984, held as follows:

> The issue posited for review is whether appellant's right of confrontation was denied by this procedure. (Admission of Count's statement). We conclude that such a denial occurred.

The Court of Appeals went on to find that the error was of "federal constitutional dimension" and was not harmless beyond a reasonable doubt under the *Chapman v. California,* 386 U.S. 17 standard and found the Assignment of Error to be well taken. The Court of Appeals affirmed appellant's conviction for Aggravated Robbery but reversed the Kidnapping and Aggravated Murder convictions and remanded for a new trial.

On January 4, 1985, the State of Ohio filed its Notice of Appeal and Memorandum in Support of Jurisdiction to the Supreme Court of Ohio. The Supreme Court of Ohio denied the motions of the State of Ohio on April 15, 1985.

COUNTS

On June 19, 1981, the same Grand Jury that indicted Adkins also indicted Counts on identical charges.

On August 24-28, 1981, in the Court of Common Pleas of Pickaway County, Ohio, defendant was tried to a jury and was found guilty of all three charges. Counts was similarly sentenced to the Ohio Penitentiary for a period of not less than seven and no more than twenty-five years on the Aggravated Robbery charge and to life imprisonment on the Aggravated Murder charge. The sentences were to run consecutively. The court found the Kidnapping charge merged into the Aggravated Murder charge and did not impose sentence as to that offense.

On December 7, 1981, Counts filed a timely notice of appeal in the Court of Appeals for Pickaway County, Ohio, and raised the following Assignment of Error:

> ASSIGNMENT OF ERROR NO. 2:
> The trial court erred in admitting evidence of the co-defendant's extra-judicial statements at trial.

On December 5, 1984, the Court of Appeals filed its opinion and on December 11, 1984, filed an amendment to the opinion which affirmed the Aggravated Robbery conviction but reversed the Kidnapping and Aggravated Murder convictions upon the same basis as in Adkins. The Court held:

> In light of the above we conclude that not only were the hearsay statements by Counts [*sic*, Adkins] introduced at trial inadmissable under the Rule of Evidence, they were also inadmissible as a matter of constitutional law. Such ad-

mission constituted a denial of appellant's Sixth Amendment guarantee of confrontation.

The court also found the error was not harmless under *Harrington v. California,* 395 U.S. 250. The judgment entry of the Court of Appeals was filed on December 27, 1984. The State of Ohio filed its Notice of Appeal to the Supreme Court on January 4, 1985, and the Supreme Court denied the motion without opinion on April 15, 1985.

STATUS OF PARTIES

Both Respondents remain incarcerated in the Southern Ohio Correctional Facility at Lucasville, Ohio, under their convictions of seven to twenty-five years for Aggravated Robbery. Respondent Counts is eligible for parole in September 1993. Respondent Adkins is eligible for parole in September 1993.

STATEMENT OF FACTS

Defendant Adkins visited co-defendant Counts at the home of Joy Cheadle in Ashville, Ohio, where Counts gave Adkins his shotgun. Both defendants left the Cheadle residence and Counts drove Adkins to the Village Carryout on June 17, 1981 located in Ashville, Ohio. Each defendant claims the other made the statement on the way to the carryout, "We may have to waste him."

Both defendants entered the carryout without disguise even though they were known in the community. One of the defendants carried the shotgun and ordered the clerk to put the cash into a bag which he did. The other defendant got liquor. The clerk was ordered at gun point to accompany the defendants when they left.

One of the defendants drove the car with the other defendant and the clerk in it. A few miles away the car was stopped at the request of one of the defendants and one of the defendants took the clerk over an embankment into the woods and shot him in the head at close range with a 12-gauge shotgun, killing him.

The other defendant remained in the car. The defendant who did the actual shooting stated "I blew half his head off." Counts drove off with Adkins in the car, and Adkins disassembled the shotgun and threw the parts out of the car window. The clerk's wallet, money, and jewelry, which were taken from him, were also thrown out of the car. Both defendants handled the shotgun.

The defendants had been observed and identified by neighbors of the carryout as they entered and exited it. Joy Cheadle testified she discovered Counts' shotgun missing shortly after they left. The defendants went to the apartment of Sherri Morrow, Adkins' girlfriend, where defendant Adkins had unexplained cash in his possession. Defendant Adkins had stopped on his way from the murder scene and purchased new clothing and, when he arrived at the Morrow residence, he showered and put his new clothes on. Both defendants were apprehended shortly thereafter because witnesses picked the defendants out of mug shots and identified their car, and the Sheriff knew where they lived from prior contacts with them.

Initially, both defendants were interrogated separately. Defendant Adkins at first stated he was not in Ashville, Ohio; then he stated he was in Ashville but he knew nothing about the robbery. He then admitted that he was with Counts and that there was a robbery, kidnapping, and murder but that Counts did it all.

Adkins then took the Sheriff to the scene of the murder where the body was found.

After the body was found, Counts was interrogated a second time. (Initially, Defendant Counts had stated that he was not in Ashville on the evening of the murder and that he had disposed of the shotgun two weeks before.) Upon being told that the body had been found, Counts then admitted he was in Ashville with defendant Adkins and that he gave Adkins his shotgun. He admitted they did go the the carryout but that Adkins said on the way there, "We may have to waste him." Both entered the carryout, and Counts stated he went to the liquor rack while Adkins went to the counter with the gun and robbed the clerk. Counts stated it was Adkins who ordered the clerk at gunpoint to the car, and it was Adkins who told Counts to stop the car and ordered the clerk over the embankment and then he heard a shot. Counts admits that both he and Adkins handled the clerk's wallet, rings, wristwatch, money, and the gun, all of which were thrown out of the car window. Counts admits going to Sherri Morrow's apartment that evening, where Adkins showered and changed clothes. Upon arrest, Counts still had his same shirt on. Only Adkins had changed clothes.

After obtaining statements from both defendants, the Pickaway County Sheriff asked Counts if he would confront Adkins, and he agreed to do so. The two defendants were brought together. Proper *Miranda* warnings were given. The Sheriff then had Adkins repeat his statement.

At defendant Counts' trial, the Pickaway County Sheriff testified what Adkins said during Counts' confrontation (Appendix, A25).

At defendant Adkins' trial, the Pickaway County Sheriff took the stand and testified what Counts had said during Adkins' confrontation (Appendix, A11).

ARGUMENT IN SUPPORT OF CERTIORARI

1. The solicited extra-judicial post-arrest statement of a co-defendant made to a law enforcement officer in a face-off confrontation with the defendant with his consent after the giving of the warning advice mandated by *Miranda v. Arizona* 384 U.S. 436 wherein the defendant adopts the statement of the co-defendant that an armed robbery was planned and took place, that after the robbery a kidnapping and murder of the store clerk occurred and that he was present at all times but he denied carrying the gun or killing the victim can be repeated at defendant's trial where the co-defendant does not testify without violating defendant's right to confrontation.

The case of *Sparf v. United States* 51 U.S. 183, 39 L. Ed. 343 (1894) holds:

> 2. Where two persons are jointly indicted for murder the declarations of one of them are admissable against the other if made in the presence of the latter under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.

This authority has never been overruled. Its rationale has been followed in virtually every jurisdiction. *See, generally,* Annot., *Admissability as against conspirator of extra judicial declarations of co-conspirator,* Supreme Court Cases 1 L. Ed. 2d 1780

(1956); *Admissability of inculpatory statements made in the presence of accused, and not denied or contradicted by him,* 80 A.L.R. 1235 (1932), supplemented in 115 A.L.R. 1510 (1938); and *Admissability of statement of co-conspirators made after termination of conspiracy and outside accused presence,* 4 A.L.R. 3d 671 (1965).

The State of Ohio follows the rule set forth in *Sparf,* supra.

The syllabus of *Vecchio v. Ohio,* 15 Ohio App. 153 (Cuyahoga Cty. 1921) states:

> 2. It is not error in a criminal prosecution to admit in evidence an alleged confession signed by a co-indictee of defendant, where the evidence shows that the statement was read to the defendant, that he admitted that it was true in almost every particular, and he voluntarily discussed it with detectives who testified to examining him, it being a link in the conversation between defendant and such detectives.

The facts of that case reveal the detective was asked to relate the entire conversation and he stated that the defendant said the statement he heard was true in almost every particular and the detective further stated:

> THE WITNESS: In substance, he said that the statement was true, other than that he did not carry a revolver into the store. Just the language he used, I cannot recall.

The case of *State v. Poole,* 50 Ohio App. 2d 204 (Summit Cty. 1976), 362 N.E.2d 678 (1976) in its syllabus states:

> When a person charged with a crime agrees to and acknowledges the statements of an ac-

complice implicating such person in the commission of the crime, the acknowledged statements become his own confession by ratification or adoption and are admissible as evidence against him.

The court went on to state, at page 206:

The law appears to be fairly well established that where it is shown a party clearly and unambiguously agrees to and adopts statements of another, the statements to which he agrees are admissible in evidence against him. Where a defendant acknowledges statements of an accomplice, the acknowledged statement becomes his own confession by ratification or adoption. The statement of the accomplice is not limited in evidence as hearsay of the accomplice but is admitted in evidence as a voluntary confession of the defendant through the medium of his ratification. No confrontation issue is presented here since the ratified statement is not hearsay evidence. *See* 2, *Jones on Evidence,* 476, Section 13:28 (6th Edition, Gard. rev. 1972); 4 *Wigmore on Evidence,* 148, Section 1075 (4th Edition, Chadbourne Rev. 1972), Compare, *Commonwealth v. Cheeks* (1968) 429 Pa. 89, 239 A.2d 793; *Commonwealth v. Bethea* (1969) 214 Pa. 253, 251 A.2d 721. Compare also, *State v. Swinger,* (1966), 5 Ohio St. 2d 151, 160 *Vecchio v. State* (1921) 15 Ohio App. 153.

In the case of *State v. Swinger,* 5 Ohio St. 2d 151 (1966), *cert. denied* 385 U.S. 874, 87 S. Ct. 148, 17 L. Ed. 2d 101, two co-defendants confronted each other. Defendant Swinger freely admitted his participation in the

events although he steadfastly denied that he delivered the beating to the deceased. Swinger claimed that Bellamy delivered the fatal beating and Bellamy contended that Swinger delivered the fatal beating. The court stated at page 159:

> [T]he record shows that Miller [a third co-defendant] was present at the time Swinger made his statements and affirmatively stated that they were essentially correct. In view of this, he purports to adopt the statements and make them his own. The voluntary confession of an accomplice made in the immediate presence of an accused is admissible against the accused even though the accomplice and the accused were under arrest if the accused ratified the confession or adopts it as his own. Whether there is such an adoption or ratification is a question of fact for the jury to determine after proper instructions from the court. . . .

The court went on to discuss whether or not there was a denial of confrontation and found there was not.

Ohio Evidence Rule 801 (D)(2)(b) incorporates the case law cited above.

The Court of Appeals for Pickaway and Highland Counties specifically addressed the federal confrontation issue under the Sixth Amendment of the United States Constitution and found it was violated. Therefore, in effect, the Fourth District Court of Appeals for the State of Ohio overruled the reasoning of *Sparf*.

The case of *United States v. Hale,* 422 U.S. 71, 45 L. Ed. 2d 99, 95 S. Ct. 2133 (1975) implies that the rationale of *Sparf* is still good law. Even though the

defendant in *Sparf* was silent and the case addressed the issue of post-arrest silence, the court stated:

> Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. . . .

Therefore, it appears that, under Ohio law as well as federal law, in order to avoid adopting a co-defendant's statement made in the presence of the defendant, the defendant is obligated to unequivocably deny its content. In the case at bar, neither defendant denied the factual accuracy of the statements. Neither defendant disputed that the Sheriff accurately and fully repeated what was said by each defendant. When each defendant only denied pulling the trigger, each, in fact, was admitting that he was an aider and abettor!

There is no definitive case law that states what happens when a defendant admits part but denies part of a co-defendant's statement made in his presence. It is not reasonable nor logical to disregard the entire statement of the defendant, at least in regard to the part he adopts. As stated in Ohio law, this is a question of fact for the jury to determine—whether or not the denial was unequivocable so as to preclude adoption by the defendant.

The Fourth District Court of Appeals for Ohio has construed the Sixth Amendment of the Constitution more restrictively than the prior pronouncements of this Court. Therefore, one of the most useful and often used interrogation techniques has been stripped away from law enforcement officials.

The statements of the defendants were not hearsay, and they did not violate the confrontation clause of the Sixth Amendment of the Constitution, and the murder and kidnapping convictions of each should be reinstated.

2. It is harmless error under the *Chapman v. California* 386 U.S. 18, and *Harrington v. California*, 395 U.S. 250, standards to admit a co-defendant's statement made in the presence of the defendant and denied in part by the defendant when the part of the statement adopted and not denied by the defendant along with other evidence presented establishes defendant's guilt overwhelmingly upon an aiding and abetting theory, to wit: the defendants planned an armed robbery, obtained a shotgun, went to a carryout, one robbed the clerk at gunpoint and kidnapped him and drove him to a wooded area and murdered him, each defendant saying he was present at all times but did not carry the gun or do the actual shooting.

Both defendants freely admit prior planning, obtaining the shotgun, going to the carryout, the armed robbery, the kidnapping and the murder. The only dispute was who had the gun, and who pulled the trigger. Who had the gun, and who pulled the trigger was irrelevant to the offenses of Complicity in Aggravated Robbery, Kidnapping and Murder since Ohio Revised Code 2923.03 says an aider and abettor shall be prosecuted and punished as if he were a principal offender.

In the case at bar, the part of the statement each defendant objected to was merely cumulative to other evidence of the accused's guilt which was overwhelming.

First, each defendant admitted being present at all times. Joy Cheadle testified that she noticed the shotgun was missing. Witnesses identified the car and the defendants entering the carryout and exiting it. Defendant Adkins purchased new clothing and took a shower, presumably to remove the blood, brain tissue, and mud from his clothing because Mr. Flowers' brains had been blown out and spattered everywhere. Liquor stolen from the carryout was found in the motor vehicle. Part of the gun was found along the route taken. Defendant Adkins showed the Sheriff where to find the body.

Upon that state of facts, any error in the introduction of that part of the co-defendant's statements not adopted and ratified by him was harmless error under *Chapman v. California* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) and *Harrington v. California* 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969).

The Fourth District Court of Appeals in the Adkins case stated:

> There is in the record in this case ample independent evidence tending to establish directly and by inference that appellant was guilty of not only the aggravated robbery but also the kidnapping and murder either in the capacity of principal or as an aider and abettor. Thus, the jury might well have returned the same verdict absent the controverted hearsay.
>
> On the other hand, given the nature of the defense tendered by appellant, the hearsay was a major piece of evidence which, if accepted by the jury, totally negated and rendered worthless appellant's version of the kidnapping and murder. Under such circumstances, we are not persuaded it may be considered harmless

> error under the *Chapman* standard. Assignment of error 3 is well taken.

The identical language is used in the opinion of defendant Counts.

It is inconceivable for one to believe that a hostage taken at gunpoint to a secluded wooded area wherein one defendant had to drive and one defendant had to hold the gun, that both defendants would not be guilty of murder as an aider and abettor. Therefore, the conclusion of the Fourth District Court of Appeals is contrary to, and violates, the harmless error standard set forth above.

This Court should find that harmless error occurred and reinstate the murder convictions.

CONCLUSION

Ever since the case of *Sparf v. United States* in 1894, it has been proper to face off co-defendants in a criminal case and, if one makes a full confession in the presence of the other who does not unequivocably deny the facts stated, then it can be inferred that those facts are true. Such reasoning is equally valid when a defendant admits substantially all of the facts involved in the case, and these facts were sufficient to convict him as an aider and abettor. The confrontation clause of the Sixth Amendment of the United States Constitution is not offended by such interrogation techniques.

Assuming, in arguendo, that such an interrogation technique does violate the confrontation clause of the Sixth Amendment, under the facts of the case at bar, the admission of the contested portion of the co-

defendant's statement was harmless error in light of the fact that the part of the co-defendant's statement which was adopted was sufficient to convict each defendant as an aider and abettor. Even without the entire statement, each defendant's guilt was overwhelmingly proven beyond a reasonable doubt by other competent evidence.

There appears to be a direct conflict between the decision of the Fourth District Court of Appeals and the Supreme Court of the United States as to whether or not such a procedure violates the federal confrontation clause.

The decision, which adressed only federal grounds, conflicts with Ohio Supreme Court authority construing those federal grounds.

Evidence that was admittedly factually correct and relevant to aiding and abetting was excluded. A defendant's admission is powerful evidence of guilt, and society should not be deprived of a valuable technique to solve crime. Face-off confrontation must be reinstated.

For all the valid reasons stated herein, certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Filed April 3, 1985)

SUPREME COURT OF OHIO

1985 TERM

STATE OF OHIO,
Appellant/Cross-Appellee,
v.
WILLIE EUGENE ADKINS,
Appellee/Cross-Appellant.

Case No. 85-12

JUDGMENT ENTRY

Upon consideration of the motion and cross-motion for leave to appeal from the Court of Appeals for Highland County, and the claimed appeal as of right from same said court, it is ordered by the Court that said motions are overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS: Motion Fee, $20.00, paid by R. L. Kline.
COSTS: Motion Fee, $20.00, paid by affidavit of poverty.

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS THEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date April 3, 1985.

James Wm. Kelly, *Clerk*
Sam F. Adkins, *Deputy*

(Filed December 27, 1984)

COURT OF APPEALS
HIGHLAND COUNTY, OHIO

(Fourth Appellate District)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
WILLIE EUGENE ADKINS,
Defendant-Appellant.

Case No. 468

JUDGMENT ENTRY

This cause came on to be heard upon the appeal on consideration of law, assignments of error, the record from the Court of Common Pleas of Highland County, the briefs and argument of counsel.

Upon consideration thereof, the court finds that the judgment of the trial court should be affirmed in part and reversed in part, for the reasons set forth in the opinion filed herein and made a part thereof.

It is therefore ordered by the court that the judgment of the trial court be, and the same is, hereby affirmed in part and reversed in part and this case is remanded for a new trial on the kidnapping and murder charges.

It is further ordered that a mandate be sent to the Court of Common Pleas of Highland County for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this judgment, with a copy of the opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by counsel, excepts.

HOMER E. ABELE
Presiding Judge

(Filed December 5, 1984)

COURT OF APPEALS
HIGHLAND COUNTY, OHIO

(Fourth Appellate District)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
WILLIE EUGENE ADKINS,
Defendant-Appellant.

Case No. 468

OPINION

PER CURIAM:

This case, an appeal from the Highland County Court of Common Pleas, originated in Pickaway County. Defendant-Appellant Adkins and Danny Counts robbed a liquor store in Ashville, kidnapping the store clerk, Harold Flowers, and took him to a remote area where he was killed. Adkins and Counts were granted separate trials and a change of venue to Highland County.

Adkins, charged with aggravated robbery, kidnapping and aggravated murder with specifications, was found guilty on all charges. He now appeals, designating 5 assignments of error.

"ASSIGNMENT OF ERROR 1:
The trial court erred in refusing to instruct the jury on the lesser included offenses of murder and involuntary manslaughter."

Appellant Adkins requested jury instructions on lesser included offenses. The leading case on lesser included offenses is *State vs. Nolton* (1969), 19 Ohio St.2d 133, which provides in its syllabus as follows:

"If in a criminal case the evidence adduced on behalf of the defense is such that if accepted by the trier of the facts it would constitute a complete defense to all substantive elements of the crime charged, the trier will not be permitted to consider a lesser included offense."

Nolton is still the law in Ohio although it has been clarified in subsequent decisions. *State vs. Scott* (1980), 61 Ohio St.2d 155; *State vs. Wilkins* (1980), 64 Ohio St. 382; *State vs. Solomon* (1981), 66 Ohio St.2d 214.

Applying the *Nolton* standard we find no error. On the facts presented in the record one can only conclude that Adkins was an active participant in the kidnapping and murder, or he was not.

If the jury believed Adkins' version of the night's events, it could have found him guilty of the robbery, which he admitted. A jury could not have found him guilty of either murder or manslaughter. Adkins testified that Counts forced the store clerk at gunpoint to come with them, that when he stopped to let the clerk out Counts took the shotgun, over Adkins protest, and killed Flowers. (Tr. pgs. 360-368) The crimes of kidnapping and murder were, according to Adkins' defense, from their inception to completion, entirely the result of Counts' actions. This testimony, if believed by the jury, would constitute a defense to all substantive elements of

the crime charged. To find Adkins guilty of murder or even manslaughter would, if one believed his evidence, be the very sort of compromise verdict warned against in *Nolton*. Assignment of error 1 is overruled.

> "ASSIGNMENT OF ERROR NO. 2:
> The trial court erred in overruling Appellant/Defendant's motion to suppress his in-custodial statements."

There is no question that defendant was advised of his rights and knowingly waived them when he made statements to police officers. Appellant asserts two claims. One is that all conversations between Adkins and police were not recorded. Appellant cites no authority for the proposition that this is required, nor can we find any, nor can we see how he was prejudiced thereby. The other claim is that although there were no promises made to Adkins regarding a lesser charge on leniency, he was somehow induced to make a statement. The trial court found no inducements, threats, or persuasion were used and the transcript of the motion to suppress amply justifies the court's conclusion. Assignment of error 2 is overruled.

> "ASSIGNMENT OF ERROR NO. 3:
> The trial court erred by admitting testimony and evidence of a co-defendant's extra-judicial statements at trial."

Adkins' version of events as set forth in assignment of error 1 differed substantially from Counts' version. It was a disputed issue at trial as to who carried the weapon upon entering the store, who forced Flowers to leave and who fired the fatal shot.

Within approximately twenty-four hours after the robbery, through intensive and expert police work by the Pickaway County Sheriff's Department, both Adkins

ficer, the declarant being under oath, representation by counsel with the right to cross examine the declarant and a record made of the proceedings. *California vs. Green* (1970), 339 U.S. 149. The absence of counsel at the prior hearing is itself sufficient to require exclusion of the hearsay evidence. *Pointer vs. Texas,* supra. See also concurring opinion of Chief Justice Celebrezze in *State vs. Young* (1983), 5 Ohio St.3d 221, 227. Accordingly, the right of appellant to cross examine Counts at the jail house "confrontation" is wholly insufficient to satisfy the constitutional right. Similarly, the right to cross examine the Sheriff at trial is likewise insufficient because it was the credibility of Counts which was the critical issue.

The State argues the statements by Counts to the testifying witness were proper for the reason they were non-hearsay pursuant to Evid. R. 801 (D)(2), which authorizes introduction of adoptive admissions of a party. Such rule is wholly inappropriate as the record reflects without question that at the "confrontation" at the jail, appellant disputed Counts' version of the facts and adhered to his initial statement that Counts, not he, was the instigator of the kidnapping and murder. A good discussion of the relationship of the confrontation clause and Evid. R. 801, as applied in a criminal case, is discussed in *Ohio Evidence Manual,* Giannelli, Sec. 801.12(b).

In light of the above, we conclude that not only were the hearsay statements by Counts introduced at trial wholly inadmissible under the rules of evidence, they were also inadmissible as a matter of constitutional law and such admission constituted a denial of appellant's Sixth Amendment guarantee of Confrontation.

Inasmuch as the error was of federal constitutional dimension, it can be deemed harmless only if the review-

ing court can declare it was harmless beyond a reasonable doubt. *Chapman vs. California* (1967), 386 U.S. 17. Such determination must be based upon the appellate court's reading of the record and on what seems to the court to have been the probable impact of the inadmissible evidence upon the minds of an average juror.

There is in the record of this case ample independent evidence tending to establish directly and by inference that appellant was guilty of not only the aggravated robbery, but, also, the kidnapping and murder, either in the capacity of principal or as an aider and abettor. Thus, the jury might well have returned the same verdict absent the controverted hearsay.

On the other hand, given the nature of the defense tendered by appellant, the hearsay was a major piece of evidence which, if accepted by the jury, totally negated and rendered worthless appellant's version of the kidnapping and murder. Under such circumstances, we are not persuaded it may be considered harmless error under the *Chapman* standard. Assignment of error 3 is well taken.

> "ASSIGNMENT OF ERROR NO. 4:
> The trial court erred in overruling Appellant's motion for a mistrial entered because the prosecutor repeatedly violated the trial court's orders."

The prosecution made reference to statements made by Counts to the Sheriff. The first was done during direct examination and was objected to. The objection was sustained and the jury cautioned. We see no error there. This was done during final argument, again objected to, and again the jury was cautioned. Their references were minor, and the judge did caution the

jury each time. The granting or denying of a motion for mistrial is within the discretion of the court, and we cannot hold that the trial judge abused his discretion by denying the motion. Assignment of error 4 is not well taken.

"ASSIGNMENT OF ERROR NO. 5:
The trial court erred by overruling Appellant/Defendant's motion for a transcript of the trial of co-defendant."

Counts was tried first and Adkins' attorney requested a copy of that trial. Inasmuch as the witnesses and the testimony would no doubt be the same in many cases, having a transcript of the first trial would be handy for defense counsel in preparing his case. Counsel does not cite any authority that such a transcript must be provided automatically. To be sure, a co-defendant may demonstrate a need for the transcript, but there is no showing here. We would further note that if an indigent co-defendant was automatically entitled to the transcript of a co-defendant's trial as a matter of constitutional right, the co-defendant who was tried first would automatically be put at a disadvantage because no prior testimony would be available to him to prepare his case. Being tried first would almost be, ipso facto, be a constitutional deprivation—an unusual proposition. Assignment of error 5 is not well taken and is overruled.

Based on the foregoing, the judgment of the trial court finding appellant guilty of aggravated robbery is affirmed, and this case is reversed and remanded for a new trial on the kidnapping and murder charges.

Judgment affirmed in part & reversed & remanded in part.

ABELE, P.J. dissents.

STEPHENSON, J. concurs in judgment & opinion.

GREY, J. concurs in judgment & opinion.

COURT OF COMMON PLEAS
HIGHLAND COUNTY, OHIO

STATE OF OHIO,
Plaintiff,
v. Case No. 81 CR 89
WILLIE EUGENE ADKINS, a/k/a,
WILLIE ADKINS,
Defendant.

TRANSCRIPT OF PROCEEDINGS
(September 21-24, 1981)

Partial Testimony of Dwight E. Radcliff, Sheriff of Pickaway County, Ohio

[282] WHEREUPON: Both counsel approached the Bench where the conversation was not heard by the Reporter or anyone else in the Courtroom.

THEREUPON: The discussion ended at the Bench and Mr. Carter put the following in the record, which was not heard by the Jury or anyone else in the Courtroom:

MR. CARTER: Counsel for the Defendant has just requested the Judge to give a limiting instruction as to the Sheriff's testimony concerning the statement of Danny Counts while in the presence of Sheriff Radcliff only.

THE COURT: Show that request will be granted.

WHEREUPON: Everyone heard the following:

THE COURT: Now, ladies and gentlemen of the Jury, there has been testimony here by the Sheriff as to a statement of Danny Counts which was not in the presence of Mr. Adkins, and the Court sustains that objection that has now been made and instructs you to disregard that statement that Danny Counts made out of the presence of Mr. Adkins.

MR. KLINE: Okay.

Q. Now, was there a confrontation between Defendant Counts and—Danny Allen Counts—and Defendant Adkins where they both gave statements in the presence of each other?

A. There was a confrontation between Danny Allen Counts and Willie Eugene Adkins, yes.

Q. Okay. And what were those statements?

[283] A. As I indicated, it occurred in my office and both of them were there. Mr. Adkins was brought in and he sat down to my right, Mr. Counts sat down to my left, the Prosecutor and Detective Brown were there also, and at that time I indicated to each of them, asked them and inquired of them if they knew who the other particular person was, and there was no problem there, each knew the other, and I then proceeded to get into a confrontation of the two statements that had been given.

Of course Mr. Counts had just given a statement, and Mr. Adkins had given a statement earlier at London, Ohio, and as I said, not having an opportunity to have them reduced to writing yet, I talked with them concerning statements that both of them had made, and I particularly went to Mr. Counts as to the statement that he had made as far as leaving the Joy Cheadle residence to go to the Village Carry-Out for the purpose of committing a robbery, and the fact that Mr. Adkins had said "We may have to waste him." and Mr. Counts indicated that was correct.

Mr. Adkins did not say anything whatsoever. He did shake his head no, that's not right.

We proceeded through the statements along the same line. They were free to talk, either one of them, at any time, and basically there was agreements in the statements as to who was driving the car—It was never denied by either [284] one of them that Mr. Counts was driving; it was never denied by either of them that Mr.

Counts was the owner of the car; it was never denied by either one of them that they were in Columbus; it was never denied by either one of them that they came back to the residence; it was never denied that there was a shotgun by Counts obtained from the Cheadle residence. There was a discrepancy on each of the statements as to who carried the shotgun out. The ownership of the shotgun was never disputed.

As far as the robbery at the Ashville Village Carry-Out, there was a discrepancy in the statements as to who went in armed with the shotgun. There was a discrepancy as to who announced the stick-up. Mr. Counts indicated—and I examined them again in the presence of Mr. Adkins of the fact that Mr. Adkins is the one that announced the stick-up and further Mr. Adkins had indicated to the Store Attendant "Don't make me kill you in here." That in fact they left; there was a discrepancy as to who went out first; there was no discrepancy as to who got in the passenger side; there was no discrepancy on who drove the car.

At one point, they indicated that Mr. Flowers, the store attendant, had been put into the center of the car over the console, and it was also indicated that he later was in the back seat.

As far as traveling from the Village Carry-Out, there was no discrepancy there.

[285] Out State Route 752, no discrepancies there, who was driving the car and so forth.

To the location, which we found the body, it was just a general area of so many miles approximately, pretty well agreed between the two of them as far as the statement to that.

There was a discrepancy on who got out of the car and took Mr. Flowers over the embankment. Each said the other did. Mr. Counts indicated that he remained in the car; Mr. Counts indicated that he did not get out of

the car. He sat in the car, which was partially on the road, Duvall Road, while Mr. Adkins took Mr. Flowers around the front of the car and down over an embankment. He indicated that a shot was fired and that shortly Mr. Adkins came back and got into the car and they left.

There was no discrepancy on the part of traveling down Duvall Road to the dead-end and turning right back to Columbus. Mr. Counts did indicate that Mr. Adkins did have a weapon. He indicated Mr. Adkins had removed the personal effects from the victim; and that he in fact threw the weapon out the right side of the car.

Upon further questioning he indicated that they returned after disposing of the items, taking the money and so forth, that they returned back to Leesburg West.

I further questioned Mr. Counts as to what Mr. Adkins had told him when he came back up from down over the bank, [286] and Mr. Adkins indicated that Mr. Counts didn't say anything until they got on back out and was north on Winchester Road toward Columbus. He said Mr. Adkins had told him he blew half his head off, or something like that.

Q. Okay. Now, what were their statements in regard to when they were at the murder scene, did you ask Danny Allen Counts in the presence of Defendant Adkins if it was in fact Defendant Adkins that went down, if he could see down there?

A. Yes, I asked Danny Allen Counts if what he said about remaining in the car when Mr. Adkins took the victim down over the bank if he could see down over the bank and he indicated that he could not see.

Q. What did Defendant Adkins say in regards to the same thing if in fact it was Danny Allen Counts that went down?

A. Uh, he had indicated to us as we were trying to locate the scene of where the body had been left, he indicated to us that the body was down there near a body of water or a creek down below.

(Decided March 6, 1985)

SUPREME COURT OF OHIO

1985 TERM

STATE OF OHIO,
Appellant/Cross-Appellee,
v.
DANNY ALLEN COUNTS,
Appellee/Cross-Appellant.

Case No. 85-11

JUDGMENT ENTRY

This cause, here on appeal and cross-appeal from the Court of Appeals for Pickaway County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

COSTS: Motion Fee, $20.00, paid by R. L. Kline.

COSTS: Motion Fee, $20.00, paid by affidavit of poverty.

FRANK D. CELEBREZZE
Chief Justice

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Pickaway County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was cor-

rectly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS THEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date April 15, 1985.

James Wm. Kelly, *Clerk*
Sam F. Adkins, *Deputy*

(Filed December 27, 1984)

COURT OF APPEALS
PICKAWAY COUNTY, OHIO

(Fourth Appellate District)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
DANNY ALLEN COUNTS,
Defendant-Appellant.

Case No. 81 CA 24

JUDGMENT ENTRY

This cause came on to be heard upon the appeal on consideration of law, assignments of error, the record from the Court of Common Pleas of Pickaway County, the briefs and argument of counsel.

Upon consideration thereof, the court finds that the judgment of the trial court should be affirmed in part and reversed in part, for the reasons set forth in the opinion filed herein and made a part thereof.

It is therefore ordered by the court that the judgment of the trial court finding appellant guilty of aggravated robbery is affirmed. The judgment is reversed

and the case remanded for a new trial on the kidnapping and murder charges.

It is further ordered that a mandate be sent to the Court of Common Pleas of Pickaway County for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this judgment, with a copy of the opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by counsel, excepts.

HOMER E. ABELE
Presiding Judge

(Filed December 11, 1984)

COURT OF APPEALS
PICKAWAY COUNTY, OHIO

(Fourth Appellate District)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
DANNY ALLEN COUNTS,
Defendant-Appellant.

Case No. 81 CA 24

AMENDMENT TO OPINION

PER CURIAM:

It appearing to the court that the final paragraph of its opinion was not fully completed. The last paragraph

of the opinion reads: "Based on the foregoing the judgment of the trial court is reversed and this case is remanded for a new trial." The last paragraph of the opinion is amended to read: "Based on the foregoing the judgment of the trial court is reversed and this case is remanded for a new trial on the kidnapping and murder charges and the judgment of the trial court finding appellant guilty of aggravated robbery is affirmed.

Judgment affirmed in part and reversed in part.

(Filed December 5, 1984)

COURT OF APPEALS
PICKAWAY COUNTY, OHIO

(Fourth Appellate District)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
DANNY ALLEN COUNTS,
Defendant-Appellant.

Case No. 81 CA 24

OPINION

PER CURIAM:

This is an appeal from a judgment of the Pickaway County Court of Common Pleas finding defendant guilty of aggravated robbery and aggravated murder. We reverse and remand for a new trial.

Appellant admitted to sheriff's deputies and in open court that he participated in the armed robbery of the Village Carryout in Ashville with co-defendant John [*sic,* Willie] Adkins. He also admitted that he drove his car, containing the carryout clerk and Adkins, to an isolated spot nearby where the clerk was murdered with

a point-blank shotgun blast. He claimed, however, that the kidnapping and murder were perpetrated by Adkins alone, and that he did not intend and did not believe that Adkins would kill the clerk.

Counts makes two assignments of error, which we will address in reverse order.

> Assignment of Error 2:
> "The trial court erred in admitting evidence of the co-defendant's extra judicial statements at trial."

Counts and Adkins were tried separately. In Counts' trial, the Pickaway County Sheriff testified over objection to the contents of a statement made by Adkins, implicating appellant as the principal in both the kidnapping and murder of the clerk. (tr. pg. 210-214) The statement was, of course, hearsay. Adkins was not called as a witness, and no showing of his unavailability to testify was made, as required by Evid. R. 804(A). On this basis alone, the statement should have been excluded.

But an additional basis for exclusion of Adkins' extra-judicial statements would apply even if he were shown to be technically unavailable. Evid. R. 804(B)(3) provides that

> "A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

The federal right of confrontation under the Sixth Amendment to the U.S. Constitution requires even more. As stated in *Mattox vs. U.S.* (1895), 156 U.S. 237, the confrontation clause requires that

> ". . . in all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . ."

The clause contemplates

> ". . . a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 156 U.S. at 242-243.

While a face to face confrontation at trial is preferred, under certain circumstances hearsay evidence may be admissible without the presence at trial of the declarant. *Ohio vs. Roberts* (1980), 448 U.S. 56; *Barber vs. Page* (1968), 390 U.S. 719. For such exceptions to apply, there must be a showing of necessity based upon the unavailability of the witness and a showing that the hearsay sought to be introduced has special indicia of reliability. As stated in *Roberts,* supra, id. 66:

> "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

As noted earlier, there was no showing that Adkins was unavailable as a witness. Testimony of an absent witness given at a prior proceeding is admissible, but it must have been a judicial proceeding or at least a proceeding which closely approximates those surrounding a typical trial. This normally includes being presided over by a judicial officer, the declarant being under oath, representation by counsel with the right to cross-examine the declarant and a record made of the proceedings. *California vs. Green* (1970), 339 U.S. 149.

The absence of counsel at the prior hearing is itself sufficient to require exclusion of the hearsay evidence. *Pointer vs. Texas,* (1965), 380 U.S. 400. See also concurring opinion of Chief Justice Celebrezze in *State vs. Young* (1983), 5 Ohio St.3d 221, 227. The presence of Counts at the jailhouse when Adkins' statement was made is wholly insufficient to satisfy the constitutional right. Similarly, the right to cross examine the sheriff at trial is likewise insufficient because it is the credibility of Adkins which is the critical issue.

In light of the above, we conclude that not only were the hearsay statements by Counts introduced at trial wholly inadmissible under the Rules of Evidence, they were also inadmissible as a matter of constitutional law. Such admission constituted a denial of appellant's Sixth Amendment guarantee of confrontation.

Because the error was of federal constitutional dimensions, it can be deemed harmless only if the reviewing court can declare it was harmless beyond a reasonable doubt. *Chapman vs. California* (1967), 386 U.S. 17. Such determination must be based upon the appellate court's reading of the record and on what seems to the court to have been the probable impact of the inadmissible evidence upon the minds of an average juror. *Harrington vs. California* (1969), 395 U.S. 250.

There is in the record of this case ample independent evidence tending to establish that appellant was guilty of not only the aggravated robbery, but, also the kidnapping and murder, either in the capacity of principal or as an aider and abettor. Thus, the jury might well have returned the same verdict absent the controverted hearsay.

On the other hand, given the nature of the defense tendered by appellant, the hearsay was a major piece of evidence which, if accepted by the jury, totally negated and rendered worthless appellant's version of the kidnapping and murder. Under such circumstances, we are not persuaded its admission was considered harmless error under the *Chapman* standard. Assignment of error 2 is well taken.

> Assignment of error 1:
> "The trial court erred in refusing to instruct the jury on the lesser included offense of murder and involuntary manslaughter."

A criminal defendant is entitled to jury instructions on lesser included offenses if, under any reasonable view of the evidence, the trier of fact could find against the state on one or more elements of the crime charged, but still find the defendant guilty of a lesser included offense. *State vs. Scott* (1980), 61 Ohio St. 155.

But the instruction is improper if the nature of the defense negates all substantive elements of the crime charged. *State vs. Nolton* (1969), 19 Ohio St.2d 133; *State vs. Wilkins* (1980), 64 Ohio St.2d 382.

Appellant in this case was charged with aggravated murder under R.C. 2903.01(B), which provides:

> "No person shall purposely cause the death of another while committing or attempting to

commit, or while fleeing immediately after committing or attempting to commit kidnapping . . ."

His requested instruction was for murder, R.C. 2903.02, and involuntary manslaughter, R.C. 2903.04.

R.C. 2903.02 defines murder as to "purposely cause the death of another." Murder is thus a lesser included offense of aggravated murder, and the jury must be allowed to consider it if the evidence could reasonably support a finding that appellant Counts purposely caused the death of the clerk but not while committing the kidnapping. We hold that it could not. The clerk was unquestionably killed while being kidnapped. There is no conceivable sequence of events in which Counts could have shared the purpose to kill without complicity in the kidnapping. His request for instructions on murder was properly denied.

R.C. 2903.04 defines involuntary manslaughter as to "cause the death of another as a proximate result of the offender's committing or attempting to commit a felony." Involuntary manslaughter is a lesser included offense of aggravated felony murder, *State vs. Scott*, supra. The jury must be allowed to consider it if the evidence could reasonably support a finding that appellant did not purposely cause the clerk's death, but that he did commit kidnapping, and that the clerk's death was a proximate result of the kidnapping.

It is obvious that whoever shot the clerk did so purposely, and is guilty of aggravated murder. The issues appellant raises, assuming part or all of his story to be true, are: (1) could the jury have found appellant, an accomplice to a robbery, responsible for aiding and abetting in the subsequent kidnapping; (2) if so, could the jury have found that the clerk's death was a proximate

result of the kidnapping; and (3) if so, could appellant have been found not to have shared the principal's purpose to kill the victim?

If all three of these questions are answered affirmatively, appellant is entitled to an instruction on involuntary manslaughter. If any one of them is answered in the negative, however, the jury, under the *Nolton* rule, must be required to choose between aggravated murder and acquittal.

We conclude that the evidence given in this case cannot support a finding that appellant was responsible for the kidnapping without also finding him responsible for the ensuing murder.

If Counts' testimony is believed, his driving the getaway car was part of the robbery. He claims he had no free choice, or intent, in the kidnapping. He claims he disassociated himself from it and attempted to dissuade Adkins from following through with it. He claims he did not participate in the kidnapping. If the jury believed this to be true, it could not find him guilty of involuntary manslaughter under R.C. 2903.04 and could not have found the proximate cause of death was Counts committing the kidnapping.

There is, however, no evidence in the record upon which the jury could find that Counts participated in the kidnapping but did not participate in the murder. Counts' testimony is given conjunctively and not disjunctively. He says, in effect, I had no intention to commit kidnapping and murder. A jury may believe or disbelieve any part of a witness's testimony, but it may not reach illogical conclusions. If a witness testifies "I ate the pork and beans," the jury may believe he did, or did not. It cannot conclude that he ate the pork, but not the beans.

When Counts testified denying intent or complicity he was denying both the kidnapping and the murder, not one or the other. The trial court was correct in denying an instruction on involuntary manslaughter under the specific evidence in the record on appeal here. Assignment of error one is overruled.

Based on the foregoing the judgment of the trial court is reversed and this case is remanded for a new trial.

Judgment reversed & remanded.

ABELE, P.J. dissents.
STEPHENSON, J. concurs in judgment & opinion.
GREY, J. concurs in judgment & opinion.

COURT OF COMMON PLEAS
PICKAWAY COUNTY, OHIO

STATE OF OHIO,
Plaintiff,
vs.
DANNY ALLEN COUNTS,
Defendant.

Case No. 81CR 75

TRANSCRIPT OF PROCEEDINGS
(August 24-28, 1981)

Partial Testimony of Dwight E. Radcliff, Sheriff of Pickaway County, Ohio

[210] Q. O.K., after this statement was completed, what happened next?

A. Shortly after 11:38 when the statement was completed, I arranged to have John [*sic*] Willie Adkins brought to my office, and to confront Mr. Adkins and Mr. Counts with the statement that Mr. Counts had just made. Upon arriving at my office, him being brought

there, I asked Mr. Counts if he noticed the individual that was just brought in. He acknowledged he did. [211] I asked him who it was. He indicated to me, it was John Adkins. I asked Mr. Adkins, at the time, if he knew the individual setting across from him.

MR. DUMM: Objection.

Q. It was in the presence of the defendant, wasn't it?

A. That is correct.

THE COURT: Overruled.

MR. DUMM: Well, I will have no opportunity to cross examine Mr. Adkins.

THE COURT: Well, he was there. Well, overruled.

A. He indicated he did, and it was Mr. Counts. So, I proceeded, at that time, to go over the statement Mr. Counts had given, and as we went through this, in the presence of Mr. Adkins, each part was touched upon, based on the fact that starting with the incident of the gun at the home of Joy Cheadle. No denial on the ownership of the gun, however, Mr. Adkins, he had left with the gun. As far as travel from the Cheadle home to the Village Carry Out, there was no denial about that. Mr. Counts was the driver of the car. As far as arriving at the Village Carry Out, no denial about that, no denial about that the previous statement had been made by the man, it was him. We then went to the Carry Out, no denial upon entering the Carry Out.

MR. DUMM: Your Honor, once again for the record, I object. There has been no denial to any of these particular matters. I take it, it is truthful.

THE COURT: Well, overruled.

[212] A. At the Carry Out, Mr. Adkins was confronted with the statement of entry and announcing of the robbery, and theft of the liquor. Mr. Adkins denied this, and stated that he, in fact, picked up the liquor, and Mr. Counts is the one that had the shotgun, and an-

nounced the robbery, and announced to put the money in the paper bag, as indicated. We proceeded, then, as far as the area of the store, the parties in the store, and again the leaving of the store, and taking Mr. Flowers, the attendant, was not denied. Mr. Adkins indicated that Mr. Flowers was taken against his will. Now, one involved as much as the other, as far as he was concerned. Proceeded to the car, no denial on who drove the car. No denial on who drove the car to the scene. Mr. Adkins said the car statement was correct, that he did drive the car. He did deny, putting Mr. Flowers, the attendant, into the front seat of the car, for the entire drive. Mr. Adkins indicated he first placed him into the front of the car, between the driver and the passenger, forced him down over the console. Mr. Counts indicated, however, during the trip, he was then placed in the back seat of the car. There was actually no denial about travel of the route. The question concerning personal effects of the victim, Mr. Adkins indicated that Mr. Counts, in fact, is the one that demanded the victim's personal effects, which included his wristwatch, rings, and pocketbook, and so forth. There was no denial on the fact, by either one of them, at that time, about each handling the money, and so forth, back and forth. As far as going to the location, it was somewhat vague, described as over back roads, and so forth. That corresponds with Mr. Counts' statement about going down Duvall Road and making a turn, and coming back. There [213] was a denial of, however when the car was stopped, that Mr. Counts was the driver, Mr. Adkins indicated Mr. Counts took the victim, Mr. Flowers, from the car, with the shotgun, and took him down over the embankment. He said he heard a shot, and then he returned to the car shortly. Thereafter, back to the driver of the car part, and then departed, with no denial about—by either one, where they went. They went back out to Winchester

Road, north on Winchester Road. Questioned about the statement Mr. Counts made concerning the disposal of the personal effects, and the weapon, Mr. Adkins indicated Mr. Counts was the one that had disposed of the items, and there was no denial that they went to Columbus, to 273 Leesburg West. Indicated during the time covering the drive, Mr. Counts indicated that he had to shoot the victim in the side of the head. Continued on to the Leesburg West address. Arrived, as about stated. No denial on the part of Mr. Adkins taking a shower, or no denial on the part of their being there for a period of time. Basically, the rest of the statement, at that point, was the same, as far as the activity that led up until the time of the arrest.

Q. Did they talk about any conversations that occurred between the Village Carry Out, and the murder scene?

A. They agreed on part of it.

Q. O.K., did they agree what conversation took place, between the Village Carry Out, and on the way to the murder scene?

A. As I indicated before, there again he contradicted the statement made by Mr. Counts earlier. When I asked him about the fact he indicated he might have to waste someone, Mr. Adkins indicated Mr. Counts made that [214] statement.

Q. All right, now that statement was made, though, on the way to the Village Carry Out?

A. Between the Cheadle residence, and the Village Carry Out.

Q. How about the Village Carry Out, and Duvall Road? Were there any statements made there, by Mr. Flowers, saying anything?

A. There was agreement that Mr. Flowers was begging for his life. He stated, he had a family, please don't hurt me, please don't kill me. You can have anything

you want, don't hurt me. This was pretty well agreed upon, by both individuals, Mr. Counts and Mr. Adkins.

Q. At the end of that statement, what happened next?

A. At the end of that statement, we arranged to return each of the individuals. Of course, Mr. Counts denied it. He alleged the statement he made was, in fact, true. So, we arranged to have them returned to their respective locations, in the Pickaway County Jail.